INDEX

CASES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 574

STATE OF ALABAMA, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 592

FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court (R. 1345), *State of Alabama* v. *United States*, is reported in 56 F. Supp. 478.

The report of the Interstate Commerce Commis-

sion (R. 4–47),[1] *Alabama Intrastate Fares,* is reported in 258 I. C. C. 133.

JURISDICTION

The final decree of the District Court was entered on August 3, 1944 (R. 1362). The petition for appeal was filed and allowed on September 1, 1944 (R. 1365, 1373). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a) and under section 238 of the Judicial Code, as amended February 13, 1925, c. 229, 43 Stat. 938, par. 4 (28 U. S. C. 345). Probable jurisdiction was noted by this Court on November 13, 1944 (R. 1393).

STATUTES

The statutory provisions here pertinent are the same as those in *North Carolina et al.* v. *United States, Interstate Commerce Commission, et al.,* Nos. 560 and 561, and are printed in the Appendix to our brief in that case, pp. 127–130.

QUESTIONS PRESENTED

In proceedings under section 13 (3) and (4) of the Interstate Commerce Act, the Commission

[1] There is a duplication of page numbers at the beginning of Volume I of the Transcript of Record. The first 27 pages reproduce Tennessee's complaint; then the printed pages of the transcript begin again at page numbered 1 and run consecutively thereafter to the end of Volume II. All record references in this brief refer to the latter pages.

found that the interstate passenger coach fare of 2.2 cents per mile, approved in previous proceedings and in effect on interstate traffic generally on all railroads to and from points in Alabama, Tennessee, and Kentucky, was just and reasonable, and that the intrastate coach fare of 1.65 cents per mile, required by state authority and in effect on the same railroads for similar service in Alabama, Tennessee, and Kentucky, caused undue prejudice against interstate passengers and unjust discrimination against interstate commerce.[2] By order dated May 8, 1944 (R. 1–3), the Commission required that the carriers remove this prejudice and discrimination by increasing the intrastate fares in each of the three states to the level of the corresponding interstate fares. The ultimate question presented is whether the court below erred in sustaining the validity of this order. Subordinate questions may be stated as follows:

I. Whether the order contravenes the Fifth or Tenth Amendments.

II. Whether the order exceeds the Commission's authority.

III. Whether the order is supported by substantial evidence.

IV. Whether the Commission's finding of unjust discrimination against interstate commerce, result-

[2] The findings also covered differences between interstate round-trip sleeping and parlor car fares and intrastate fares for similar service in Alabama and Tennessee, as explained in the statement, *infra*, pp. 5–6, footnote 3.

ing from the failure of the intrastate traffic to bear its fair proportionate share of the aggregate revenue needed to maintain adequate and efficient railway transportation service, is invalid on the ground that the earnings of the carriers from all their traffic have recently risen to a point deemed by appellants to be in excess of a fair return.

V. Whether the Commission, in finding that the low intrastate fares operated unjustly to discriminate against interstate commerce, failed to give full consideration to wartime conditions and the stabilization legislation.

STATEMENT

The report and order here involved is the same as in the *North Carolina* case, Nos. 560 and 561. The Statement in our brief in that case has the same general application and effect in the cases of Alabama, Kentucky, and Tennessee. The Alabama, Kentucky, and Tennessee commissions, like the North Carolina commission, denied applications of the carriers to increase intrastate fares to the level of the interstate fares. Alabama and Tennessee, differing from the other two states, also denied applications of the carriers to increase round-trip fares in sleeping and parlor cars to the level of the interstate fares, and the Commission's report herein includes findings that such lower sleeping and parlor car fares caused undue preference and prejudice as between interstate and intrastate passengers and unjust discrimina-

tion against interstate commerce. The order requires the carriers to increase coach, sleeping, and parlor car fares to the level of corresponding interstate fares.[3]

[3] In the *Alabama* and *Tennessee* cases there were involved not only the one-way and round-trip coach fares but also the round-trip fares in Pullmans. In these two states the one-way fares in Pullmans were the same as the corresponding interstate fares, 3.3 cents per mile, but the round-trip fares in Pullmans were 2.475 cents per mile, with a return limit of 30 days, and 2.75 cents per mile, with a return limit of 6 months (R. 21, 23, 90, 577). The order here challenged requires that these lower round-trip fares be increased to the interstate basis, namely, 2.75 cents per mile, return limit 3 months.

The order requires that the intrastate one-way coach fare of 1.65 cents per mile, then in effect in all four states, be increased to the interstate level of 2.2 cents; that the intrastate round-trip coach fares of 1.485 cents per mile, return limit 15 days, and double the one-way fare of 1.65 cents, return limit 60 days, then in effect in all four states, be increased to the interstate level, namely, 180% of the one-way fare of 2.2 cents, or 1.98 cents per mile, return limit 3 months. In all four states the one-way fare in Pullmans was the same as that applying interstate, namely 3.3 cents per mile, and, of course, the order does not touch those fares. In two states—North Carolina and Kentucky—the round-trip fare in Pullmans was the same at that applying interstate, namely 166⅔% of the one-way fare of 3.3 cents, or 2.75 cents per mile, return limit 3 months, and, therefore, the order has no application to those fares; but in the other two states—Alabama and Tennessee—the round-trip fares in Pullmans were lower than the corresponding interstate fares, the intrastate fares being 2.475 cents per mile, return limit 30 days, and 2.75 cents, return limit 6 months, and the order requires that these intrastate fares be put on

As stated in our brief in the *North Carolina* case, most of the southern carriers, in an endeavor to recover some of the passenger traffic lost to busses and private automobiles, voluntarily reduced their coach fares to 1.5 cents a mile, effective December 1, 1933. Here it is important to note that three large southern territory carriers, the Illinois Central, the St. Louis-San Francisco, and the Gulf, Mobile & Ohio, each operating substantial mileage in one or more of the three states of Alabama, Kentucky, and Tennessee, did not at any time reduce their coach fares to 1.5 cents except between points of competition with other southern territory carriers which had experimentally adopted the 1.5-cent fare. These three lines, like the other southern lines, reduced their fares in Pullmans to 3 cents, without a surcharge, but reduced their coach fares only to 2 cents (R. 72).[4] All the reductions here referred to were

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a parity with the interstate fares for the same service of 2.75 cents per mile, return limit 3 months.

The round-trip fares involved are of small importance in comparison with the one-way fares, and, hereinafter, all fares referred to are one-way fares, unless otherwise indicated.

[4] This is also true of the Chesapeake & Ohio (R. 22) and the Norfolk & Western (R. 23), whose lines are mostly in "official territory," rather than "southern territory"—south of the Ohio River and the line of the Norfolk & Western to Norfolk. But the Chesapeake & Ohio has lines in Kentucky (R. 22), and the Norfolk & Western has about 100 miles of line in North Carolina (R. 23) consisting of branches to Winston-Salem and Durham.

made effective on both interstate and intrastate traffic.

The 10% increase in passenger fares authorized by the original order of January 21, 1942, in *Increased Railway Rates, Fares, and Charges, 1942,* 248 I. C. C. 545, hereinafter called *Ex Parte 148,* applied to the whole country and, of course, resulted in changes of interstate fares to, from, and through Alabama, Kentucky, and Tennessee, as well as North Carolina. In southern territory, this increase resulted in interstate coach fares of 1.65 cents on all lines theretofore offering 1.5-cent coach fares and 2.2 cents on the lines above mentioned which had not gone below the basic 2 cents a mile except where necessary to meet competition. Similar 10% increases were authorized by all state commissions in the South, including the Alabama, Kentucky, and Tennessee commissions, which resulted in intrastate coach fares of 1.65 cents on most lines and of 2.2 cents on the several mentioned, although later these three commissions denied authority to the other lines to increase their intrastate fares above 1.65 cents.

The amendatory order of August 1, 1942, in *Ex Parte 148,* authorizing increase of the interstate coach fares in southern territory to the basis of 2.2 cents then applying elsewhere throughout the country, of course applied to the interstate fares to, from, and through Alabama, Kentucky, and Tennessee, as well as North Carolina. Pursuant to that authorization, the carriers in south-

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ern territory whose coach fares were then 1.65 cents and the three whose coach fares were then 2 cents, raised their coach fares to 2.2 cents on interstate traffic effective October 1, 1942, and thus 2.2 cents became the uniform fare on interstate traffic on all railroads in southern territory as well as elsewhere throughout the country on both interstate and intrastate traffic. All state commissions in the South permitted a similar increase on intrastate traffic except North Carolina and Alabama, Kentucky, and Tennessee. After the 1942 increases in interstate and intrastate fares and denial of carrier applications by Alabama, Kentucky, North Carolina, and Tennessee to increase intrastate fares in those states, the carriers petitioned the Commission, under provisions of section 13 (3) and (4) of the Interstate Commerce Act to provide authority to raise those fares.

The Commission, in response to the carriers' petitions, ordered investigations (R. 448), naming the carriers concerned in each proceeding as respondents, to determine whether the relation between the interstate and the intrastate fares caused violations of section 13 (3) and (4) and, if so, what fares should be prescribed to correct the violations.[5] Alabama hearings were held June

[5] The petition of the carriers in the *Tennessee* case, which is typical, appears at R. 433; the order instituting the investigation in that case, also typical, appears at R. 448. Petitions and orders in the other cases were omitted in printing.

28, 1943 (R. 547–1046). Kentucky hearings were held September 8, 1943 (R. 1140–1340). Tennessee hearings were held December 2, 1943 (R. 56–417). The carriers, the state commissions, the Federal Price Administrator, and other parties appeared at each of these hearings and presented evidence. Briefs were filed in each proceeding and the issues in all four were together argued orally before the Commission. On March 25, 1944, the Commission issued its report, deciding all four cases (R. 4–47), *Alabama Intrastate Fares*, 258 I. C. C. 133. Under full and adequate findings, the Commission found that the difference between the intrastate and the interstate fares caused undue preference and prejudice and unjust discrimination against interstate commerce, in violation of section 13 (3) and (4). Adjustment of the fares to accord to the findings was left to the carriers and the respective state commissions, but the state commissions withheld their consent to such adjustment, after which the order of May 8, 1944, here attacked (R. 1–3) was entered, requiring the respondent carriers in each proceeding to increase their intrastate fares in question to the level of the corresponding interstate fares. The effective date of the order, July 1, 1944, was postponed to August 15, 1944 (R. 1343).

The increased intrastate fares were made effective in each of the three states on August 15, 1944, and have since remained in force.

The historical background of the passenger

fares here involved is fully considered in our brief in the *North Carolina* case under the subheading "Genesis of Disparity," pp. 6–13, and the findings are fully discussed and set forth under the subheading "Summary of Commission's Findings," pp. 13–18. Since these subjects as they are discussed apply with equal force to all four state cases, reference is made to that part of the North Carolina brief without repetition herein.

PROCEEDINGS IN THE COURT BELOW

Complaints in the *Alabama* (R. 506) and *Tennessee* (R., all of Vol. I) cases were filed June 10, 1944, and in the *Kentucky* case (R. 1047) June 12, 1944, all seeking to annul and enjoin the order of May 8, 1944. The Economic Stabilization Director by the Price Administrator intervened in support of each complaint, and the several rail carriers were made parties defendant or intervened in opposition to the complainant of each state in which they were concerned.

The United States filed an answer in each case (R. 420, 532, 1125), in which the allegations of the complaints were neither admitted nor denied, in view of the filing of motions to intervene (R. 1097) and intervening complaints (R. 1098) by the Economic Stabilization Director. Due to this neutral position the United States did not participate in the proceedings before the District Court.

The answers of the Commission (R. 533) al-

leged that the order violated no constitutional rights, was within statutory authority, was supported by substantial evidence, and that a full and fair hearing had been accorded to all parties.

The answers of the intervening rail carriers (R. 540) adopted the answers of the Commission. These carriers filed a motion in each case (R. 1139) to dismiss a part of the complaint of the Economic Stabilization Director, and by order of the court (R. 543–544) the first paragraph of the prayer of the complaint (Paragraph 25, subparagraph numbered "First," R. 1116), and paragraph 17 (R. 1110–1111), together with the affidavit of one Whitnack (R. 1118–1119), and the tables and graph thereto attached (R. 1120–1124), were ordered stricken from the complaint. No complaint is made before this Court because of this action of the court below.[6]

Hearings before the statutory court were held on July 17 and 18, 1944, and the cause was submitted for final decree (R. 544–545). The court entered its findings of fact and conclusions of law August 3, 1944 (R. 1341–1344), with opinion by District Judge Miller (R. 1345–1362), and en-

[6] The answers of the Commission, the answers of the rail carriers, the motions to intervene and intervening complaints of the Stabilization Director, and the motions of the rail carriers to strike parts of the Director's complaints were, respectively, virtually identical in each of the three cases. For this reason only one of each of these documents, to which record references have been given above, was included in the Transcript of Record here.

tered a final decree on the same date sustaining the Commission's order and dismissing the complaints (R. 1362–1363). The appeal to this Court followed.

ARGUMENT

The questions involved in this appeal are in many respects fundamentally similar to those presented in the *North Carolina* case. For this reason, and to avoid unnecessary repetition, the argument in our brief in the *North Carolina* case is adopted as the basis of the argument herein, and this discussion will be largely confined to those points raised by appellants that require separate treatment.

I

The order does not contravene constitutional limitations of the Fifth and Tenth Amendments

Despite the long line of decisions of this Court consistently sustaining Federal power such as that exercised under section 13 of the Interstate Commerce Act, two of the appellants, Kentucky and Tennessee, assert that this order invades state sovereignty and violates rights reserved to the states by the Tenth Amendment. But the Federal power is so thoroughly established that it can hardly be deemed open to question. Where the interstate and intrastate operations of interstate carriers are so interwoven or commingled that the effective regulation of the one requires regulation also of the other, this Court has sustained the Federal

power, as to freight rates, in the *Shreveport* case (234 U. S. 342), and many other cases under the subsequently enacted section 13; passenger fares, *Wisconsin* case (257 U. S. 563) and many others; safety appliances, *Southern Ry. Co.* v. *U. S.*, 222 U. S. 20; hours of service, *B. & O. R. Co.* v. *I. C. C.*, 221 U. S. 612; accounting, *I. C. C.* v. *Goodrich Transit Co.*, 224 U. S. 194; boiler inspection, *Napier* v. *A. C. L. R. Co.*, 272 U. S. 605; extensions of lines, *Tex. & Pac. Ry.* v. *Gulf Ry.*, 270 U. S. 266; abandonment of lines, *Colorado* v. *U. S.*, 271 U. S. 153. See also *Illinois Comm.* v. *Thomson*, 318 U. S. 675, 682; *U. S.* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 118–120, and *Wickard* v. *Filburn*, 317 U. S. 111, 118–129. Cases decided even before the *Wisconsin*, including some of those cited above, the Court there held, left no room for discussion of the constitutionality of section 13.

Appellants submit no new argument upon the subject. See Kentucky brief, pp. 14–17; Tennessee brief, p. 2, which poses the question of contravention of the Tenth Amendment, but does not thereafter submit argument upon the question. Indeed, the argument submitted in brief goes not to the constitutionality of section 13, but merely to the question of proper exercise of authority under that section. We submit that here the authority has been properly exercised.

No argument regarding the Fifth Amendment seems necessary, as it is clear that this order does

not deprive anyone of property without due process of law.

II

The order is within the authority conferred by section 13 of the Interstate Commerce Act

The order here involved, applying to intrastate fares in Alabama, Kentucky, and Tennessee, is identical with the order in the *North Carolina* case. In view of the authorities cited in our brief there, pp. 33–39, we submit that this order, requiring removal of undue preference and prejudice as between persons and unjust discrimination against interstate commerce, is within the authority conferred by section 13 (4), and that this order, supported by findings of the existence of both types of discrimination there forbidden, is sustainable upon the determination of the validity of either of these findings.

III

The order is supported by substantial evidence

In our brief in the *North Carolina*, case, pp. 39–59, we have set out a part, but by no means all, of the evidence supporting the findings in the Commission's report in so far as they apply to that case. While the evidence in these proceedings was developed at separate hearings, in all four the evidence was fundamentally the same, differing only in some of the details. Thus, our statement in the North Carolina brief of the evi-

dence in that case gives a fairly accurate general impression of the evidence in the three cases here involved. This fact permits briefer treatment of the subject here.

(a) Substantial evidence supports the finding of reasonableness of the interstate fares

The finding in the Commission's report that the interstate fares to, from, and through points in Alabama, Kentucky, North Carolina, and Tennessee are just and reasonable is supported by evidence in each case sufficient both in detail and in comprehensiveness to embrace not only the fares of the interstate carriers operating in and through these particular states but also the fares of the carriers in southern territory as a whole. It was shown in the Alabama, Kentucky and Tennessee records, as in the North Carolina record, that the 2.2-cent fare was lower than that which prevailed in southern territory on both interstate and intrastate traffic for 25 years prior to December 1, 1933, being lower than the 2.5-cent fare which was in effect for ten years prior to World War I, lower than the 3-cent fare in effect during World War I (i. e., from April 10, 1918 to August 20, 1920), and lower than the 3.6-cent fare in effect from the latter date to November 30, 1933. The 2.5, 3, and 3.6-cent fares were in effect not only in southern territory during the periods mentioned but also elsewhere throughout the United States. (R. 65, Tenn.; R. 552, Ala.; R. 1143, Ky.)

There was also evidence, as in the *North Caro-*

lina case, showing changes in conditions subsequent to the Commission's finding in 1936 that fares of 2 cents in coaches would be reasonable, which tended independently of the evidence and findings in ***Ex Parte 148*** to support the reasonableness of the increase in that fare to 2.2 cents (R. 86, 185, 227, Tenn.; R. 579, 733–734, Ala.; R. 1212–1215 and *passim*, Ky.). It was shown that large expenditures had been made by the carriers in remodeling and air-conditioning passenger equipment (R. 86–87, Tenn.; R. 568–569, Ala.; R. 1156, Tenn.); that expenses had increased because of the expansion in the volume of passenger traffic (R. 86–87, 105–106, Tenn.; R. 567, Ala.; R. 1155, 1186, Ky.); that unusual expenses had resulted from wartime operations, including expedited movement of troop trains (R. 86–88, 106, Tenn.; R. 566, 570–572, Ala.; R. 1155–1157, 1186–1188, Ky.). It was further shown that there had been recent increases in wages (R. 136, 351, Tenn.; R. 717, 878, Ala.; R. 1211, 1294, Ky.); in the cost of materials and supplies (R. 136, 352, Tenn.; R. 717, 879, Ala.; R. 1211, 1295, Ky.); and in taxes (R. 135–136, 351, Tenn.; R. 716–717, 876–877, Ala.; R. 1211, 1293–1294, Ky.). Deficits from passenger operations in the years 1936–1942 were also shown (R. 123–124, 342, Tenn.; R. 712, 714, 869, Ala.; R. 1201–1203, 1284, Ky.).

There were also comparisons of the intrastate coach fares in question with other contemporane-

ous fares for like service (R. 67, 70, 72, Tenn.; R. 553–554, 556, Ala.; R. 1145, 1147, Ky.).

The findings, requirements and authorizations of the Commission in *Passenger Fares and Surcharges,* 214 I. C. C. 174, and in *Ex Parte 148* were also referred to in each record.

The rate comparisons, above referred to, constituting evidence of the greatest probative value in a case of this sort, showed that the 2.2-cent coach fare was contemporaneously in effect on interstate traffic throughout the country and on intrastate traffic in the other 44 states.

We submit, as in the *North Carolina* case, that this evidence and much more which appears in the respective records amply supports the Commission's finding that the present interstate fares in southern territory are just and reasonable.

(b) Substantial evidence supports the finding as to preference and prejudice

In the *Wisconsin* case, *supra,* this Court upheld the Commission's order on the ground of discrimination against interstate commerce but refused to sustain it on the ground of preference and prejudice. That refusal was solely because the evidence failed to show state-wide preference and prejudice. In the present case, the court below (R. 1359) sustained the order here involved upon the ground of discrimination against interstate commerce, in view of which it held that decision of the question of preference and prejudice was

unnecessary. It did not hold that the evidence failed to show the existence of state-wide preference and prejudice, but only that the evidence may or may not support that finding. Our position is that the order, as based on both the findings of preference and prejudice and discrimination against interstate commerce, is supported by substantial evidence, and that the order is valid under either or both of these findings.

Ample evidence supports the Commission's finding of preference in favor of intrastate passengers and prejudice against interstate passengers, who generally ride in the same trains, and often in the same coaches, and receive identical service, where the former pays less than the latter for the same transportation. It is believed that this evidence is of substantial character, quite sufficient to provide the support necessary for the Commission's finding, and provides the evidence which was lacking in the *Wisconsin* case, because of which this Court refused to sustain that order on that ground.

This evidence showing that intrastate and interstate passengers were generally transported upon the same trains and in the same coaches was submitted by witnesses for the respondent rail carriers, experienced operators who obviously knew the conditions generally prevailing in these several states. There is no evidence to show the contrary.

In the Alabama case a number of witnesses,

employed by the State commission, testified as to the difficulties of obtaining seats, particularly upon the through trains operated in that State. This evidence only depicts the crowded conditions of wartime passenger traffic, but does not go to the extent of showing that trains were operated for the exclusive use of interstate passengers, or that trains were not available for the use of intrastate passengers.

In Tennessee effort was made to show that a few of the streamlined trains scheduled comparatively few stops within the State, and were not available for intrastate passengers. Effort was made by all the states to show that streamlined through trains were not available for all or a part of the intrastate traffic. This evidence does not go to the extent of showing that there was any difference in the availability of the service offered by these trains between interstate and intrastate passengers. The only restrictions as to the use of these trains was obviously occasioned by their schedules, designed to transport passengers long distances and with as much speed as possible. For this reason these trains scheduled stops only at the larger centers, and were not available to passengers, either interstate or intrastate, at other points. Because of the short distance across Tennessee north and south, these trains made fewer stops in that State, and for this reason were available at a less number of points in that State than in others. It seems clear

from all the evidence that even the finest and fastest streamlined trains were available in all instances, where those trains scheduled stops, alike to intrastate and interstate passengers.

The Commission record for each of the three states involved in this appeal contains specific evidence showing that intrastate and interstate passengers were intermingled and traveled on the same trains, in the same coaches, and received the same service. It is conceded that the interstate passengers paid, at the time of the hearings, 2.2 cents per mile in coaches, and intrastate passengers paid only 1.65 cents per mile. This evidence was submitted by a number of different witnesses and appears at numerous pages in the records of the several hearings. The brief filed in No. 574 on behalf of the appellees Alabama Great Southern Railway Company et al., in Appendix No. 2, pp. 29–45, sets forth in considerable detail, and separately with reference to each of the three states, portions of this evidence.

Submitted as samples of this evidence are the following: In Alabama the streamlined "Tennessean" operating through the northern end of the State is available for intrastate as well as interstate passengers at and between the four scheduled stops (R. 160). The Central of Georgia Railway makes special effort to accommodate intrastate passengers, and the Seminole Limited, operating between Chicago and Jacksonville transports intrastate passengers between Phenix

City and Birmingham (R. 619). Both interstate and intrastate passengers ride all trains of the Central of Georgia in Alabama (R. 621). The Seaboard Air Line trains make no separation of intrastate and interstate passengers and sometimes, when overcrowded, coach passengers are seated in Pullman cars (R. 632). The Atlantic Coast Line, operating from Montgomery to the Georgia line, provides air-conditioned coaches and the train handles both interstate and intrastate passengers (R. 645). The streamlined "South Wind," over the Atlantic Coast Line, is available for intrastate passengers within Alabama (R. 647). The Gulf, Mobile & Ohio provides substantially the same facilities for intrastate and interstate passengers (R. 669).

In Kentucky interstate and intrastate passengers frequently ride on the same trains and in the same coaches (R. 1149). Southern Railway trains in Kentucky handle both interstate and intrastate passengers, and there is no difference in the service afforded, and operating conditions in Kentucky are similar to operating conditions in other states in the South (R. 1190).

Passenger trains operated in Tennessee carry both interstate and intrastate passengers frequently riding in the same trains and in the same coaches, the intrastate fare being 1.65 cents per mile and the interstate 2.2 cents (R. 73). Rail lines in Tennessee have spent large sums of money in the purchase of new and modernized coaches

and these facilities are available to Tennessee intrastate passengers as well as interstate passengers (R. 87).

The evidence, typical in character,[1] was clearly sufficient to show that interstate and intrastate passengers were intermingled in the same trains and in the same cars on all railroads in these respective states. From this fact and from the further facts that the interstate fare is reasonable, that the intrastate fare is substantially lower than this reasonable interstate fare, and that the circumstances and conditions affecting this interstate and intrastate traffic are substantially similar, it follows that the undue preference and prejudice is state-wide in character, as found by the Commission. There was no contention on the part of the state authorities that, if undue preference and prejudice existed, it was not state-wide. Indeed, the state-wide character of this preference and prejudice is virtually conceded in this Court, in Point V of the statement of points upon which Alabama and Kentucky intend to rely (R. 1383) which contains the assertion that "all intrastate traffic is intermingled in the same trains and sometimes in the same cars as like interstate traffic."

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[1] In Tennessee, for example, the evidence related largely to the Nashville, Chattanooga & St. Louis Railway as a typical Tennessee line. Cf. *Georgia Comm.* v. *United States*, 283 U. S. 765, 774, and *United States* v. *Louisiana*, 290 U. S. 70, 75, 76, holding that in cases of this character typical evidence is sufficient.

It is respectfully submitted that the finding of preference of intrastate passengers and prejudice against interstate passengers is fully supported by substantial evidence and that the order, in so far as it rests upon this finding, should be sustained.

(c) Substantial evidence supports the finding of unjust discrimination against interstate commerce

Evidence was submitted of audits made for representative periods by the principal respondents in each of the four proceedings showing the estimated amount of additional revenue which the respondent carriers in each of the respective states would have received during those periods if the assailed intrastate fares had been on the interstate level. The estimated amounts, projected over the period of a year, exceeded $750,000 per annum in Alabama, $526,000 in Kentucky, and $556,000 in Tennessee (R. 25). Evidence in this regard was submitted in each case (Tenn., R. 122–123, 341; Ala., R. 707, 868; Ky., R. 1200, 1284). The fact shown by the respective records that there is a great demand for passenger service and that the passenger facilities of the railroads are taxed to their utmost capacity fully supports the conclusion that the increase in the intrastate fares to the generally prevailing interstate level would not discourage patronage, and would not result in any important loss of traffic to other forms of transportation, and that the increase in the intrastate fares would result in increased revenues at least to the extent found

in the report. This evidence supports the Commission's finding (R. 38) that "Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama, $500,000 in Kentucky * * * and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares"

The losses in these three states, added to the loss of $525,000 in North Carolina, make up a total loss for the four states of $2,275,000 per annum. In other words, the several carriers in these four states, if the lower intrastate fares had been maintained, would have received less revenue in the amount of at least $2,275,000 annually than they would have received if the same traffic had been carried at fares equal to those applying on the same railroads upon interstate passenger traffic. It is obvious that to the extent of this difference the intrastate passenger traffic under the lower intrastate fares, as found by the Commission (R. 38) was not contributing its fair share of the revenues required to enable the carriers to render adequate and efficient transportation service.

IV

The Commission's finding of unjust revenue discrimination against interstate commerce is not invalid on the alleged ground that the total earnings of the carriers from all their traffic have recently risen to a level deemed by appellants to be in excess of a fair return

In our brief in the *North Carolina* case (pp. 84–117) full argument has been submitted in

support of the proposition that intrastate traffic must bear its fair proportionate share of the aggregate revenues needed to enable the carriers to provide adequate and efficient transportation service whether the aggregate revenues from all traffic are low or, during a temporary period of extraordinary traffic volume, are above the fair return level. It is unnecessary to repeat any of that argument here.

Although it was not believed to be of legal significance, it was shown that the rates of return of the North Carolina carriers were not unduly high even when measured by the abandoned standard of fair return under the repealed provisions of the original section 15a. Evidence of record in that case showing rates of return after Federal income taxes for the carriers in the southern region for the 22-year period 1921–1942, referred to on p. 115 of the North Carolina brief, applies equally to the carriers involved in these cases, since these carriers and those serving North Carolina are the principal carriers in southern territory. Here attention is called to evidence showing rates of return during the above-mentioned 22-year period for the carriers serving Tennessee, Alabama, and Kentucky. On p. 344 of the record the rates of return of each of 12 carriers serving Tennessee are given, and it is shown that the average rate of return for those carriers for the years 1921–1942 (1942 being the last full year prior to the Commission's order) was 3.45%.

On p. 881 of the record the rate of return for 14 carriers serving Alabama is given and it is shown that the average rate of return for the years 1921–1942 was 3.24%.

On p. 1286 of the record the rates of return of 7 carriers serving Tennessee for the same period are given and it is shown that the average for the 7 was 4.30%.

These rates of return were all determined by computing the relationship of net railway operating income, that is, after Federal income taxes and other railway tax accruals, to the undepreciated book investment, and while, therefore, these rates may not be accepted as accurate, they do roughly indicate that the actual rates were low.

V

In finding that the low intrastate fares operated unjustly to discriminate against interstate commerce, the Commission did not fail to give full consideration to wartime conditions and the stabilization legislation.

In our brief in the *North Carolina* case, sections V and VI, pp. 84–125, we have discussed the arguments in the brief of the Economic Stabilization Director, which was filed jointly in No. 561, the *North Carolina* case, and Nos. 592, the *Alabama, Kentucky,* and *Tennessee* cases. The Director's underlying argument is the same for all four cases, and, as it is answered somewhat fully in the North Carolina brief, we have only a few general observations to add here.

The argument of the Director is essentially to

the effect that present revenues of rail carriers are sufficient to meet operating costs and to yield a fair return without addition of the increased revenue from the increases in the intrastate fares involved in this proceeding, and that under present revenues the railroads earn in excess of that which the Director conceives to be a fair return. But little or no effort is made by the Director to show whether or not or how the increase of these intrastate fares would affect the efforts to stabilize prices and to avoid inflation. As held by this Court, the proper place for the urging of such a showing is in proceedings before the Interstate Commerce Commission, which is vested with the exclusive authority to decide what is a reasonable revenue. Decision of this question by the Commission cannot be resolved upon the basis solely of the effect upon the stabilization program. The Director appeared in these proceedings at the several hearings, presented the evidence he desired to present, and submitted his views to the Commission. There can be no question but that the Director was fully heard by the Commission and that the Commission gave full consideration to his contentions.

Worthy of particular note is the position of the Director in respect to preference and prejudice. As shown by the records herein, interstate and intrastate passengers travel upon the same trains and in the same cars, the interstate passenger paying approximately one-third more for the

same transportation. That is obviously preference of intrastate passengers and prejudice against the interstate passengers, and the Director does not go so far as to say that such preferences and prejudices should not be removed, or that the Commission should ignore its responsibility in respect thereto, because of the stabilization program.

The court below held (R. 1360–1361), we think correctly, that the opinion of the Director is not mandatory on the Commission. The court's holding is sustained by the decisions cited, *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489, and *Interstate Commerce Commission* v. *City of Jersey City*, 322 U. S. 503, in which this Court definitely held that the operation of the Emergency Price Control Act does not supersede or prohibit the exercise of Commission authority in respect to transportation matters regulated under the Interstate Commerce Act. These cases clearly indicate that the Stabilization Director has the right to be heard in opposition to such rate increases by the Commission, but that the Commission is under no legal necessity to accept the views of the Director as a substitute for its own.

The general increases in interstate passenger fares and in the intrastate passenger fares in most of the states of the country became effective prior to the Stabilization Act of October 2, 1942. The 2.2-cent coach fares became effective on interstate traffic in the East and the West on Febru-

ary 10, 1942, and in the South on October 1, 1942, and those fares became effective on intrastate traffic in the East and the West on February 10, 1942, or shortly thereafter, and in all states in the South other than the four, on October 1, 1942, or shortly thereafter. The Commission's order here questioned requires the intrastate fares in these four states to be increased to the general level of 2.2 cents in order to remove discriminations in violation of section 13. In these circumstances this increase would not appear to be inconsistent with the stabilization program.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decree of the court below, sustaining the Commission's order and dismissing the complaints, should be affirmed.

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